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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1051.

THE AMERICAN TOBACCO COMPANY and
R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

—against—

Steamship "KATINGO HADJIPATERA", her engines, boilers, etc., and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

BRIEF ON BEHALF OF THE AMERICAN TOBACCO COMPANY AND R. J. REYNOLDS TOBACCO COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. CATESBY JONES,
HENRY N. LONGLEY,
Proctors for The American Tobacco Company and R. J. Reynolds Tobacco Company.

JOHN W. R. ZISGEN,
Of Counsel.

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The case as presented to this Court by the petition for a writ of certiorari really presents a question of fact only; for, if the S. S. "Katingo Hadjipatera", requisitioned only for "possession and use" (R. 89, see Finding No. 4 in the attached Appendix), was not at the time of filing of the libel *in the possession of the Greek Government*, then, since the requisition was *in invitum*, under the decision of this Court in *The Navemar*, 303 U. S. 68, the vessel was not immune from arrest.

The District Court, in an elaborate set of findings, not only found that the S. S. "Katingo Hadjipatera" was not in the possession of the Greek Government, but, also, after carefully examining all of the surrounding circumstances, it found facts which clearly supported its finding as to this master fact, viz., that the Greek Government postponed taking control of the vessel until she rid herself of her cargo. The Greek Government's purpose in thus delaying taking possession and control of the vessel is easily understandable, since, if it had taken possession and control of the vessel before the cargo was discharged, it would have subjected itself to claims of a most embarrassing nature.

As the findings of the District Court were not numbered at the time of their filing, for convenience of the Court we have printed them as an appendix to this brief, with numbers which can be used for ready reference. The references to the record at the end of each finding refer to the findings as signed by the District Judge and to the testimony supporting such finding.

On appeal the Circuit Court of Appeals affirmed the decree below on the opinion of the District Court, which it thus adopted. Therefore, the case comes here on facts concurrently found by the District Court and the Circuit Court of Appeals which we respectfully submit do not present any new question for decision by this Court. This Court has repeatedly stated that it would not disturb findings concurrently found by lower courts. *Friendship II*, 61 S. C. Rep. 687, 690; *U. S.* v. *O'Donnell*, 303 U. S. 501, 508; *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, 510.

POINT I.

There is not any conflict between the decision below and any decision of this Court nor with any decision of any Circuit Court of Appeals.

The petitioner does not suggest that there is any conflict between the decision below and that of any other Circuit Court of Appeals. It does say, however, that there is a conflict between the decision below and the decision of this Court in *The Navemar*, 303 U. S. 68; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562 and in *Ex Parte Muir*, 254 U. S. 522. It has failed, however, to indicate where any such conflict exists. In *The Navemar*, 303 U. S. 68, at page 75, this Court laid down the law thus:

> "The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum, actual possession by some act of physical dominion or control in behalf of the Spanish Government*, was needful, *The Davis*, 10 Wall. 15, 21; *Long* v. *The Tampico*, 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma*, 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least *some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.* Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long* v. *The Tampico, supra*, 493, 494; cf. *Berizzi Bros. Co.* v. *The Pesaro, supra.*" (Italics ours.)

Since both Courts below concurrently found that the "Katingo Hadjipatera" was never in the actual possession of the Greek Government and was never subject to any act of physical dominion or control in behalf of the Greek Government (see Appendix, Findings 4-19 inclu-

sive), the order of requisition did not operate to change the status of the vessel from that of a private vessel to that of a public vessel. *The Navemar, supra.* Neither in *Ex Parte Muir,* 254 U. S. 522, nor in *Berizzi Bros. Co.* v. *S. S. "Pesaro",* 271 U. S. 562, is there any expression of the Court which in any way conflicts with the law as thus stated in *The Navemar.*

Concerning the passages from the testimony of Captain Courbellis and Captain Skinitis, referred to at pages 17, 18 and 19 of the brief of the petitioner, it is sufficient to say that Captain Courbellis never contended that the Greek Government had taken possession or control of the S. S. "Katingo Hadjipatera". On the contrary, he testified that Captain Skinitis, the master of the vessel, told him that *"The steamer will be given to the possession of the Greek Government after she would be discharged"* (R. 84). Captain Skinitis testified that, in answer to the letter through which Captain Courbellis conveyed to him the information that the vessel had been requisitioned, he said: "I told him that I received his letter as regards to requisition of the ship and *as soon as the ship discharges, I will be at his orders"* (R. 92).

The District Court both saw and heard these witnesses, and we submit that in the light of this testimony, it was clearly correct in finding that the "Katingo Hadjipatera" was never in the possession of the Greek Government and was not under its orders because the "Katingo Hadjipatera" had not been discharged at the time suit was brought.

In *The Carlo Poma,* 259 F. 369, the Circuit Court of Appeals for the Second Circuit said (p. 370):

> "The law of the United States is the same [as that of England], except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, *but also upon the actual possession* by the sovereign of the property *at the time process is*

served. The Davis, 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 491; *The Attualita,* 238 Fed. 909." (Italics ours.)

This case was cited with approval in *The Navemar,* 303 U. S. 68 at page 75.

The proposition stated in Point I of the brief filed in support of the petition is, therefore, irrelevant, because it is in no way applicable to the facts here presented. The findings below establish that the "Katingo Hadjipatera" was never in the possession of the Greek Government and was never in its service.

POINT II.

The questions as presented by the petition have all either been answered by this Court in previous cases, or they present questions of fact only.

At pages 7 and 8 of the petition the petitioner lists some nine questions to be presented to this Court.

Question No. 1 was answered in the negative by this Court in *The Navemar,* 303 U. S. 68. This Court held that a decree of attachment, without more, was insufficient to constitute a vessel a public vessel, and that in order to make a vessel immune from suit, actual possession by some act of physical dominion or control in behalf of the foreign government claiming immunity was needful. In order to obtain physical possession, as this Court stated in *The Navemar,* there must be either actual possession by some act of physical dominion or control. When the master stated that he did not recognize the control until after the vessel was discharged of her cargo, obviously the vessel did not enjoy the immunity of a public vessel until her cargo had been discharged. The vessel's cargo was not discharged until long after suit was brought.

Question No. 2 does not accurately present the facts in the case. (See Appendix, Findings 1-19.) Moreover, in *The Navemar*, 303 U. S. 68, 73, this Court enumerated findings almost identical with those set forth by petitioner in its question 2, and held that such facts were sufficient to establish that a vessel, although requisitioned by a decree taking title, and not merely use, as was the case here, was still in the possession of her owners. The facts enumerated by this Court in *The Navemar* were as follows:

> "(1) None of the consular officers mentioned had done any act purporting to take possession of the vessel.
>
> (2) None of them had informed the master that he wished to take possession, or had any intention of doing so.
>
> (3) That the vessel had proceeded under the command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of the owner.
>
> (4) Upon arrival at New York, the master, under direction of the ship's agent, had discharged cargo.
>
> (5) That before discharge the freight money was paid by the consignees to the agents of the time charterer in New York."

Question No. 3 does not arise on the facts of this case. Captain Courbellis, as both courts below found, testified that he did not take physical possession of the ship and did not intend to take physical possession until the cargo had been discharged. Captain Skinitis, the master of the vessel, testified that he did not intend to give physical possession until the cargo had been discharged. Consequently, Question No. 3 as stated in the petition has no application to the facts of this case (Appendix, Findings 17, 18, 19).

Question No. 4 does not accurately present the facts of the case. Captain Skinitis, the master of the vessel, stated that he would not place himself at the orders of the Greek Government until after he had discharged his cargo (Appendix, Finding 18).

Question No. 5 has been answered in the negative by this Court. This Court held in *The Navemar* that attachment without more was insufficient to place a foreign government in possession of a vessel. *The Navemar*, 303 U. S. 68, at page 75.

Question No. 6. There was no evidence below which established that possession had been taken by the Greek Government. On the contrary, the evidence established the exact opposite (Appendix, Findings 17-19). Both Captain Skinitis and Captain Courbellis stated that the vessel would not be delivered into the possession of the Greek Government until after the cargo had been discharged (R. 84, 92, 96, 97).

Question No. 7. presents merely a question of fact. Moreover, counsel conceded in the court below that the Greek Government had no property in the S. S. "Katingo Hadjipatera". He stated in open court:

> "I don't think ever through the case we have questioned the matter of title. We haven't claimed that the title was transferred.
>
> The Court: By the requisition?
>
> Mr. Wolfe: Yes" (R. 97).

In the light of this statement of counsel, and of the evidence in the case, both courts below found that possession and use only of the vessel were requisitioned by the Greek Government (R. 108). Even Captain Courbellis, who represented the Greek Government, testified:

> "Q. Is it required that there be a change from the private owner to the government under a requistion? A. No, it is not necessary because the steamer be-

longs to the owner. It is not bought, it is not sold by [to] the government. Only the government uses the steamer, possesses and uses the steamer" (R. 89).

In the light of these findings and evidence we are unable to perceive how petitioner in its Question No. 7 can refer to the S. S. "Katingo Hadjipatera" as the property of the Greek Government. The plain fact is that its Question No. 7, does not relate to the facts of this case.

Question No. 8 is purely a question of fact, and the evidence in the case fully supports the concurrent findings of the District Court and of the Circuit Court of Appeals.

Question No. 9. The Circuit Court of Appeals applied the law as stated by this Court in *The Navemar*, 303 U. S. 68, and this question presents nothing to be considered by this Court.

POINT III.

The Court is under no duty to accept a claim of immunity without proof until such claim has been accepted by the executive branch of the Government. In the present case the Government has not accepted the claim of immunity presented by the Greek Government.

It is not until a "claim is recognized and allowed by the executive branch of the government" that it is the duty of the court to accept it. *The Navemar*, 303 U. S. 68, 74.

Even the statements contained in the note of the Greek Minister to the Secretary of State (R. 23), and submitted to the District Court by the United States Attorney, are not conclusive evidence of the facts set forth in the statement. Such evidence is subject to rebuttal. *United States* v. *Lee*, 106 U. S. 196, 204, 215, 219; *Tindal* v. *Wesley*, 167 U. S. 204, 218, 221, 224; *South Carolina* v. *Wesley*, 155 U. S. 542, 544, 545.

In order to determine the nature of the so-called "Suggestion of Immunity" submitted by the United States Attorney, it is only necessary to examine it. The circumstance that the United States Attorney calls his document "Suggestion of Immunity" is of no importance. Its nature must be determined from its content. From the document itself the following appears:

(1) That the United States Attorney is acting under the direction of the Attorney General (R. 19). [The actual direction of the Attorney General is not printed in the record.]

(2) The United States Attorney is directed to bring to the attention of this Honorable Court certain diplomatic representations concerning the status of the Greek steamer "Katingo Hadjipatera". A copy of the communication from the Secretary of State to the Attorney General is annexed to the suggestion and marked "Exhibit A" (R. 20). In that note the Secretary of State informs the Attorney-General that he has been requested by the Greek Minister to the United States to bring to the attention of the Court certain diplomatic representations concerning the status of the Greek steamer "Katingo Hadjipatera".

(3) The representations made on behalf of the Government of the Kingdom of Greece are set forth in a note (R. 23) dated March 13, a certified copy of which is annexed to the Secretary of State's note to the Attorney General, in which it is said that the steamer "Katingo Hadjipatera" has been requisitioned by the Greek Government for public use in the successful prosecution of the war in which the Greek Government is now engaged.

(4) The letter of the Secretary of State requests (R. 22) that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington with regard to this vessel be brought to the attention of the Court.

(5) In bringing the matter to the attention of the Court, the United States does not intervene as an interested party, nor does the United States Attorney appear either for the United States or for the Government of the Kingdom of Greece, but the United States Attorney presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece (R. 19-20).

The contention was made that this suggestion from the United States Attorney constituted a decision by the executive branch of the United States Government that this vessel was immune, such as resulted in the release of the "Exchange" (*The Exchange*, 7 Cranch 116).

It is apparent from a comparison of the suggestion made by the United States Attorney in the case of *The Exchange*, 7 Cranch 116, at pages 118-19, and the suggestion in this case, that the two suggestions are in no way alike.

In *The Exchange*, the United States Attorney prayed that the Court would be pleased to order and decree that the process be quashed and that the libel be dismissed with costs, and *that the said public vessel be released. The Exchange*, 7 Cranch 116, 119.

Here the suggestion of the United States Attorney contains no prayer whatever; on the contrary, it disclaims any partisanship and says that the United States Attorney is merely bringing the matter to the attention of the Court "for such consideration as this Court may deem necessary and proper" (R. 20).

So that his meaning might be entirely clear the United States Attorney states (R. 19):

> "The representations made on behalf of the Government of the Kingdom of Greece are set forth in a note, dated March 13, 1941 * * *."

A certified copy of this note is annexed to the suggestion of the United States Attorney (R. 23), and the letter of the Secretary of State requesting the Department of Justice to bring this matter to the attention of the Court is also annexed (R. 20). In the letter of the Secretary of State directed to the Attorney General, it is expressly stated (R. 22):

> "I shall appreciate it if at the earliest possible moment you will instruct the appropriate United States Attorney to appear in proceedings against this vessel in the United States District Court for the Southern District of New York and present to the Court the enclosed certified copy of the note of the Greek Minister, with its enclosures, *without argument or comment* on his part, other than to state that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece." (Italics ours.)

The distinction between the suggestion in *The Exchange* and the suggestion here is clearly pointed out in the case of *The Attualita*, 238 F. 909, by the Circuit Court of Appeals for the Fourth Circuit, where it said:

> "The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in *The Exchange*, 7 Cranch 116, 3 L. Ed. 287, with that in this case, shows quite clearly that, *while in The Exchange the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind*" (238 F. at p. 911). (Italics ours.)

It should be observed that one of the grounds upon which certiorari was granted in *The Navemar*, 303 U. S. 68, at page 71, was a conflict between the Fourth Circuit (*The Attualita*) and the decision of the Circuit Court of Appeals for the Second Circuit in *The Navemar*, 90 F. (2d) 673. This Court in *The Navemar*, 303 U. S. at page 75, adopted the view expressed in *The Attualita*. In other words, when a court receives a suggestion like that tendered to the court here, such a document merely brings to the Court's attention certain facts which the Attorney General requests shall be received, *Stanley* v. *Schwalby*, 162 U. S. 255, at page 270; whereas in *The Exchange*, the executive branch made the formal request that the process be quashed, the libel dismissed, and the public vessel be released.

In the present case the District Court, in deference to the earnestness with which counsel for appellant pressed this argument, requested the executive branch to inform it whether the executive branch "expressly recognizes the Greek Government's claim of sovereign immunity of the vessel from process in accordance with the practice suggested by the Supreme Court in *Ex Parte Muir*, 254 U. S. 522" and added "that if a further communication from the State Department is not submitted the Court is inclined to require proof" (R. 55). In response to this request, the executive department said:

> "The position of the Department as set forth in its letter of March 14, 1941, to you in regard to this vessel is similar to that which has been taken by it in other cases involving the question of the requisition of merchant vessels by foreign governments.
>
> While the Department of State is desirous that the Greek Government should obtain promptly possession of all vessels to which it is entitled it feels that the question of the status of the 'Katingo Hadjipatera' is one for judicial determination" (R. 55).

Clearly, after receipt of this communication, no further serious contention could be made that the executive branch had decided that the vessel was immune. The executive branch of the United States Government, having relegated the Greek Government to its remedy of establishing by evidence that the S. S. "Katingo Hadjipatera" was in the actual possession and under the control of the Greek Government at the time of her arrest, and both Courts below having found that the vessel was not in the possession nor under the control of the Greek Government at the time of her arrest, no question is presented on this record for review by this Court.

POINT IV.

When a court appears to have all the elements of jurisdiction, a sovereign who would oust the jurisdiction must furnish proof to support its claim.

In *Puente* v. *Spanish Nat. State,* 116 F. (2d) 43, 45, the Circuit Court of Appeals for the Second Circuit has recently said:

> "When a court appears to have all the elements of jurisdiction of an action, it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim. The explanation appears in *Ex Parte Muir, supra,* 254 U. S. at page 532, 41 S. Ct. at page 187, 65 L. Ed. 383, where it is said: '*Prima facie* the District Court had jurisdiction of the suit and the vessel [case cited], and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were

not within the range of judicial notice and needed to be established in an appropriate way."

In other words, in a case of this character it must be kept in mind that a contention that a vessel is immune from jurisdiction, amounts to an assertion of an exception to the general rule, which is that when a merchant vessel of a foreign nation enters our waters, she submits herself to the jurisdiction of our Courts.

The general rule is that the jurisdiction of a nation within its own territory, is exclusive and absolute. Any restriction upon the jurisdiction is an exception to the general rule. *The Exchange,* 7 Cranch 116, 135.

> "The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, *its extent must be regulated by the nature of the case,* and the views under which the parties requiring and conceding it, must be supposed to act.
>
> When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the

country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." *The Exchange,* 7 Cranch 116, 143-4. (Italics ours.)

See also to the same effect, *United States* v. *Dickelman,* 92 U. S. 520, 525, where this Court said:

"The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."

Wildenhus's Case, 120 U. S. 1, 11;
Cunard S. S. Co. v. *Mellon,* 262 U. S. 100, 124, 125;
Uravic v. *Jarka Co.,* 282 U. S. 234, 240.

This suit is for damage to cargo carried by a vessel under contracts of affreightment (R. 5, 6) and in such a suit the owner of damaged cargo has a lien on the ship because she has been impliedly hypothecated to answer for non-performance of the contract of carriage. This Court has said:

"that the right to the lien [sought to be enforced by the suit] has its source in the contract of affreightment and that the lien itself is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance."

Krauss Bros. Co. v. *Dimon S. S. Corp.,* 290 U. S. 117, at page 121.

Hence, when libellants filed their libel against S. S. "Katingo Hadjipatera", they were asserting a well established property right against that vessel. They should not be deprived of that right except on clearest proof, proof satisfactory to the court that the vessel, S. S. "Katingo

Hadjipatera", was *held and used* for a public purpose, and that it had been *acquired, manned and operated* by the Greek Government in the carrying trade. See *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, at page 574.

CONCLUSION.

It is respectfully submitted that the application for certiorari should be denied.

Respectfully submitted,

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